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## A POSITIVE DEFENSE OF ADMINISTRATIVE PREEMPTION

*Joshua Hawkes\* & Mark Seidenfeld\*\**

### INTRODUCTION

Several years ago one of us coauthored an article entitled *Administrative Law's Federalism* suggesting that, from a functionalist perspective, administrative agencies might be preferable to Congress as the primary locus for federal preemption of state law.<sup>1</sup> That article argued that agency rulemaking is more transparent, deliberative, and accountable than Congress's legislative process.<sup>2</sup> It therefore suggested that, even without specific statutory authority, an agency should be able to preempt state law by issuing rules authorized by its organic statute.<sup>3</sup> The article prompted a response by Professors Ernie Young and Stuart Benjamin, in which they characterized it as "giv[ing] zero attention to claims that the Constitution may simply require Congress to make [calls that intrude on state regulatory authority]."<sup>4</sup>

More recently, Professor David Rubenstein wrote an article contending that, under the Supremacy Clause of the Constitution, acts of administrative agencies cannot have preemptive effect on state law.<sup>5</sup> Rubenstein relied on an earlier work by Professor Bradford Clark, who used an originalist perspective to support a structural argument that the Supremacy Clause limits the scope of preemptive federal law to the Constitution, to statutes passed by Congress, or to treaties negotiated by the president and ratified by two-thirds of senators.<sup>6</sup>

Clark himself had reasoned that agency regulations are not exercises of legislative authority, and therefore their preemptive effect, if any, must

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<sup>1</sup> Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1938-39 (2008).

<sup>2</sup> *Id.* at 1948-83.

<sup>3</sup> *Id.* at 2008.

<sup>4</sup> Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2119 (2008) (emphasis omitted).

<sup>5</sup> David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1129 (2012).

<sup>6</sup> *Id.* at 1154 (citing Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1332-36 (2001)).

derive from the statute authorizing such action rather than from the action itself.<sup>7</sup> Although the precise implications of Clark's position are unclear, unlike Rubenstein, he envisions that administrative action can preempt conflicting state law.<sup>8</sup> In fact, Clark suggests that to determine whether an agency regulation trumps inconsistent state law, one need only evaluate whether the agency was statutorily authorized to adopt that regulation.<sup>9</sup> But, as made clear below, this proposition stands in tension with the principle that preemptive effect must come from the underlying statute.<sup>10</sup>

Clark does not explicitly address whether, under his reading of the Supremacy Clause, Congress can statutorily delegate to an agency the authority to preclude state regulation of a particular matter on which the agency has not adopted any substantively conflicting regulation. His discussion of the nondelegation doctrine, however, suggests that he would view such a statute as an unconstitutional delegation of legislative authority.<sup>11</sup> In any case, both Rubenstein and Clark would reject the suggestion in *Administrative Law's Federalism* that agencies should have the power explicitly to prohibit state regulation as part of their ordinary substantive rulemaking authority.

In light of this scholarship, this Article provides a positive law defense of the position staked out in *Administrative Law's Federalism*—that as a matter of constitutional law, agencies with substantive rulemaking authority should be viewed as having the power to preempt state law without either their organic statutes explicitly providing for this preemption or Congress explicitly delegating preemptive discretion to the agencies. Part I of this Article addresses Clark and Rubenstein's arguments for their respective positions. Part II develops the implications of our positive argument for administrative preemption power independent of congressional intent, describing the bounds of preemption that can attach to federal regulatory actions.

## I. THE POWER OF AGENCIES TO PREEMPT UNDER THE SUPREMACY CLAUSE

Section A of this Part lays out basic preemption doctrine. Section B then engages Clark and Rubenstein on their own originalist turf, addressing the textual and intentionalist arguments for their respective positions. Section C further develops the functional implications of those positions, and

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<sup>7</sup> Clark, *supra* note 6, at 1430-31.

<sup>8</sup> *See id.* at 1431-33.

<sup>9</sup> *See id.* at 1434-35.

<sup>10</sup> *See infra* Part I.B.3 (discussing tension in Clark's position that agency action preempts conflicting state law).

<sup>11</sup> Clark, *supra* note 6, at 1431-33.

shows, in particular, that Rubenstein's position is contrary to the understanding of the Supremacy Clause from the time of the Constitution's ratification.

### A. *Review of Basic Preemption Doctrine*

Before describing and critiquing the positions set forth by Clark and Rubenstein, it is useful to clarify the various preemption categories. This serves the dual purposes of defining the terms used in this Article and allowing a sufficiently fine-grained evaluation of Clark and Rubenstein's positions.

#### 1. Conflict Preemption<sup>12</sup>

Courts have recognized that when a federal law conflicts with a state law, the state law will be preempted.<sup>13</sup> What constitutes conflicting law, however, is not always clear. The narrowest type of conflict preemption occurs when it is impossible for one to comply with both state and federal law.<sup>14</sup> For example, if a federal environmental law prohibited an owner of a wetland from filling in the wetland, but a state law aimed at mosquito control required the owner to fill that wetland, the state law would be preempted because the owner cannot comply with both laws. More broadly, however, courts have recognized that conflict preemption extends to situations when state law would create an obstacle to effectuation of the goal of federal law, even though an entity could technically comply with both laws.<sup>15</sup>

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<sup>12</sup> Clark calls conflict preemption "substantive" preemption, alluding to the fact that preemption comes about simply by the federal government enacting some substantive provision of law. *See id.* at 1433-34.

<sup>13</sup> *See, e.g.,* *United States v. Locke*, 529 U.S. 89, 109 (2000); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

<sup>14</sup> *See* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."); *but see* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227-29 (2000) (noting that preemption due to the impossibility of complying with both state and federal law "is vanishingly narrow").

<sup>15</sup> *See* Nelson, *supra* note 14, at 228-29 ("'[O]bstacle preemption' potentially covers not only cases in which state and federal law contradict each other, but also all other cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law."); *see also, e.g.,* *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (holding that the Employee Retirement Income Security Act ("ERISA"), a federal act, preempted state law that "would undermine the purpose of ERISA's mandated survivor's annuity"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) ("By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the

Essentially, under “obstacle preemption,” courts imply preemption based on the understanding that a federal law should not be read to permit states to mandate conduct that directly undermines the federal law’s goals.<sup>16</sup>

## 2. Jurisdictional Preemption<sup>17</sup>

In some cases, federal law forbids states from regulating certain subjects altogether.<sup>18</sup> The most straightforward jurisdictional preemption is what courts refer to as “express preemption,” which occurs when federal law expressly provides that states may not regulate the subject at issue.<sup>19</sup> In addition, courts have recognized “implied jurisdictional preemption,” which occurs when courts find that a statute is intended to prohibit state regulation of a subject even though it does not expressly so provide.<sup>20</sup> The most common form of this type of preemption is “field preemption,” which occurs when a court finds that federal law so pervasively regulates a subject that it occupies the field and could not be intended to allow states to regulate that subject as well.<sup>21</sup> This is different from obstacle preemption because field preemption prohibits state regulation even if that regulation is consistent with the overall goal of the federal regulatory scheme.<sup>22</sup>

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full purposes and objectives’ of the due-on-sale regulation.” (quoting *Hines*, 312 U.S. at 67)). *Fidelity Federal* also made clear that “[f]ederal regulations have no less pre-emptive effect than federal statutes.” *Id.* at 153.

<sup>16</sup> See *Hines*, 312 U.S. at 67.

<sup>17</sup> We borrow this term from Clark because the Court does not have a term to refer generally to preclusion of state regulation independent of federal substantive law on the subject. Clark, *supra* note 6, at 1433-34. More generally accepted terms for jurisdictional preemption include express and field preemption. See Nelson, *supra* note 14, at 226-27.

<sup>18</sup> See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Hines*, 312 U.S. at 62-63.

<sup>19</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550-51 (2001) (finding that the Federal Cigarette Labeling and Advertising Act expressly precluded states from prohibiting advertisement of tobacco products within 1,000 feet of a school); *Jones v. Rath Packing Co.*, 430 U.S. 519, 538 (1977) (“[I]t is the express intent of Congress to supersede any and all laws of the States . . . which are less stringent than . . . this title or regulations promulgated pursuant thereto.” (quoting 15 U.S.C. § 1461) (internal quotation marks omitted)).

<sup>20</sup> See, e.g., *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

<sup>21</sup> See, e.g., *United States v. Locke*, 529 U.S. 89, 111 (2000) (“[The Federal Act] covers ‘design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning’ of tanker vessels. Congress has left no room for state regulation of these matters.” (citation omitted) (quoting 46 U.S.C. § 3703(a))); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212-13 (1983) (concluding that “the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”).

<sup>22</sup> See *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) (“When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.”).

B. *The Extent of “Laws of the United States” Made in Pursuance of the Constitution*

This section discusses the structural and textual arguments that Clark and Rubenstein use to support their respective limitations on the power of administrative action to preempt state law. To do so, it is helpful to start with the text of the Supremacy Clause of the Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>23</sup>

1. Structural Arguments Regarding Meaning of “Laws of the United States”

Clark argues that the Supremacy Clause incorporates a limitation on the type of federal law that can preempt state law.<sup>24</sup> In particular, he contends that the history of the Supremacy Clause suggests that the drafters of the Constitution intended to allow only those actions of the federal government that involve significant participation and approval by the Senate to have preemptive power.<sup>25</sup> Senate involvement, he argues, was a means of ensuring that state legislatures could protect their laws from federal preemption.<sup>26</sup> Based on this thesis, Clark claims that the term “Laws of the United States” in the Supremacy Clause means statutes passed by Congress.<sup>27</sup>

Clark supports his thesis by noting that the Constitutional Convention rejected proposals allowing either the federal legislature or executive to negate state laws as either saw appropriate.<sup>28</sup> Initially, the Virginia Plan proposed that representation of both houses of the legislature be apportioned by “[q]uotas of contribution, or . . . the number of free inhabitants” in each state.<sup>29</sup> The Virginia Plan, supported by the large states, also pro-

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<sup>23</sup> U.S. CONST. art. VI, cl. 2.

<sup>24</sup> Clark, *supra* note 6, at 1329-31.

<sup>25</sup> *Id.* at 1347, 1365.

<sup>26</sup> *Id.* at 1330-31.

<sup>27</sup> *Id.* at 1331 (“[T]he Founders understood constitutionally prescribed lawmaking procedures to establish the exclusive means of adopting ‘the supreme Law of the Land.’” (quoting U.S. CONST. art. VI, cl. 2)).

<sup>28</sup> *Id.* at 1351-55.

<sup>29</sup> James Madison, *Notes on the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15, 20 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

vided for the legislature to negate state laws that it determined to be incompatible with the articles of the union.<sup>30</sup> The Convention rejected both aspects of the plan.<sup>31</sup> The specific rejection of the provision allowing the federal legislature to negate state laws represented an important stand against allowing large states to control the governing of small states.<sup>32</sup>

Small states responded with the New Jersey Plan, under which the legislature would consist of a single house, with one representative from each state.<sup>33</sup> In addition, the New Jersey Plan would declare “Acts of the U[nited] States in Cong[re]ss” to be the “supreme law of the respective States.”<sup>34</sup> The Convention also rejected the New Jersey Plan.<sup>35</sup> With respect to representation, the Convention instead adopted the Great Compromise.<sup>36</sup> The Great Compromise mandated that each state would receive an equal number of senators, chosen by the state legislature, to represent it in the Senate, while each state’s representation in the House of Representatives would be proportional to its population.<sup>37</sup> Just one day after the Great Compromise, the Convention adopted the initial version of what became the Supremacy Clause.<sup>38</sup>

Clark argues that the Supremacy Clause ultimately adopted is substantively identical to the supremacy provision in the New Jersey Plan,<sup>39</sup> which clearly had been meant to protect states from federal legislative encroach-

<sup>30</sup> *Id.* at 21.

<sup>31</sup> See discussion *infra* notes 38-40 and accompanying text.

<sup>32</sup> See discussion *infra* notes 38-40 and accompanying text.

<sup>33</sup> See James Madison, *Notes on the Constitutional Convention* (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 29, at 242, 242-45.

<sup>34</sup> *Id.* at 245.

<sup>35</sup> Journal of the Constitutional Convention (June 19, 1787), in 1 FARRAND’S RECORDS, *supra* note 29, at 312, 312-13.

<sup>36</sup> See Rufus King, *Memorandum* (July 15, 1787), in 2 FARRAND’S RECORDS, *supra* note 29, at 12, 12-14; Journal of the Constitutional Convention (June 21, 1787), in 1 FARRAND’S RECORDS, *supra* note 29, at 353-54.

<sup>37</sup> Journal of the Constitutional Convention (July 16, 1787), in 2 FARRAND’S RECORDS, *supra* note 29, at 13, 13-14. Later in the Convention, the framers set the number of senators per state at two. Journal of the Constitutional Convention (July 23, 1787), in 2 FARRAND’S RECORDS, *supra* note 29, at 85.

<sup>38</sup> James Madison, *Notes on the Constitutional Convention* (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 29, at 25, 28-29. The precise language of the provision moved by Luther Martin and adopted without debate read,

Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding . . . .

Journal of the Constitutional Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 29, at 21, 22.

<sup>39</sup> Clark, *supra* note 6, at 1354.

ment.<sup>40</sup> That plan would have made statutes enacted by Congress and treaties into which the United States entered the supreme law governing states. It would have left to the courts (primarily state courts in the first instance) the role of determining whether these sources of federal law conflicted with state law.<sup>41</sup> He notes that after the adoption of the Supremacy Clause, the Convention added the Constitution as a source of federal law that could preempt state law.<sup>42</sup> He claims that this addition also supports his thesis, because it takes a two-thirds vote of both the Senate and the House to propose a constitutional amendment, in addition to ratification by legislatures of three quarters of all states.<sup>43</sup> Hence he concludes that, by requiring that only federal action subject to the approval of at least a majority of the Senate could preempt state law, “the small states lost the war (between the Virginia Plan and the New Jersey Plan), but won the battle (between the congressional negative and the Supremacy Clause).”<sup>44</sup>

Although Clark’s thesis is attractive, there are weaknesses in his conclusion that the drafters meant for all preemptive federal law to be approved by the Senate.<sup>45</sup> Perhaps the most overarching problem with Clark’s argument is that he interprets provisions for making law of various types as having been intended primarily to protect states from federal encroachment.<sup>46</sup> But the most straightforward understanding of those provisions was simply to procedurally burden federal lawmaking, and thereby to encourage deliberate consideration of the interests of minority factions,<sup>47</sup> with the effect on state power being secondary.

There are also reasons to question Clark’s particular argument that the Supremacy Clause was meant as a limit on federal power. First, Clark attributes rejection of congressional negation of state law to small states’ concerns that the more populous states would negate their laws as the larger states saw fit.<sup>48</sup> But by the time the Supremacy Clause was first incorporated into the draft of the Constitution, the Great Compromise had occurred

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<sup>40</sup> Interestingly, despite strong state protections, the supremacy provision of the New Jersey Plan also authorized the federal executive to call forth the powers of the “Confederated States” to enforce and compel the obedience of states and individuals to legislative acts. Madison, *supra* note 33, at 242-45.

<sup>41</sup> Clark, *supra* note 6, at 1351.

<sup>42</sup> *Id.* at 1354.

<sup>43</sup> *See id.* at 1366-67.

<sup>44</sup> *Id.* at 1354.

<sup>45</sup> *Id.* at 1358.

<sup>46</sup> *See id.* at 1366.

<sup>47</sup> *See* THE FEDERALIST NO. 51, at 264 (James Madison) (Bantam Books 1982) (“It is of great importance in a republic . . . to guard one part of the society against the injustice of the other part.”); THE FEDERALIST NO. 63, at 320 (James Madison) (Bantam Books 1982) (suggesting the Senate would provide “auxiliary precautions” against “violent passions” and “unjust measures”).

<sup>48</sup> *See* Clark, *supra* note 6, at 1353 (“[D]elegates from the smaller states voiced strong opposition to giving the national legislature even a limited negative over state law. These members regarded the congressional negative as both unnecessary and impracticable.”).



and the small states were guaranteed equal representation in the Senate.<sup>49</sup> Hence, the larger states had as much to fear from small states negating their laws. The August 23 debate in the Convention indicates that preemption of state law no longer seemed to reflect a battle between large and small states. Charles Pinkney from the small state of South Carolina proposed a resurrection of the negative, while Gouverneur Morris from the large state of Pennsylvania argued against it.<sup>50</sup> The proposal was voted down with the large state of Massachusetts voting against and the small state of New Hampshire voting in favor.<sup>51</sup>

Second, given equal representation in the Senate, congressional negation would have provided more protection of state laws than the Supremacy Clause.<sup>52</sup> The Great Compromise was recognized as creating significant legislative inertia, impeding Congress's ability to enact federal statutes.<sup>53</sup> The fact that the small states would control the Senate while the large states would control the House suggests that Congress would almost never have sufficient votes to negate state law, except perhaps obvious and egregious efforts by states to gain a strategic advantage over their sister states.<sup>54</sup> The courts, however, would provide a ready forum for anyone aggrieved by a state law that the litigant felt contradicted valid federal law. Moreover, despite the language limiting preemption to federal action requiring Senate participation, Gouverneur Morris at least suggested that courts would be free to strike down state law "that ought to be negated" without resorting to federal law.<sup>55</sup> Hence, the framers must have recognized that the likelihood of Congress enacting federal law negating a state law was much lower than the likelihood that a court would negate state law under the Supremacy Clause.

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<sup>49</sup> Journal of the Constitutional Convention, *supra* note 38, at 22.

<sup>50</sup> James Madison, *Notes on the Constitutional Convention* (Aug. 23, 1787), in 2 FARRAND'S RECORDS, *supra* note 29, at 384, 390-91.

<sup>51</sup> *Id.* at 391.

<sup>52</sup> In battles between large and small states, congressional negation would seem to provide greater protection to small states given equal representation in the Senate because (1) senators were directly accountable to state legislatures and thereby the politically powerful in the states, and (2) the inertia built into the legislative processes would make passage of any negatory statute more difficult than raising preemption in a lawsuit.

<sup>53</sup> See Clark, *supra* note 6, at 1344-45 (noting that bicameralism and presentment help protect states interests because of the influence states have in the Senate and over presidential elections); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1609 (2000) ("[T]he ultimate political safeguard [of federalism] may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia.").

<sup>54</sup> Cf. Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 INT'L REV. L. & ECON. 145, 156-57 (1992) (noting that bicameralism with diverse constituencies in each house will discourage special interest legislation, but is more apt to allow genuinely majority-supported legislation than would a supermajority requirement).

<sup>55</sup> Madison, *supra* note 38, at 28.

Thus, perhaps adoption of the judicially enforceable Supremacy Clause was seen not as a means to protect small states, but rather as furthering some other goal. One of the major impetuses for the Convention was the prevalence of state actions that compromised the welfare of the United States as a whole under the Articles of Confederation.<sup>56</sup> The Convention wanted a mechanism capable of voiding such actions—that is, a mechanism to protect the federal system from the efforts of states to give themselves unfair advantages vis-à-vis their fellow states.<sup>57</sup> Given the understanding, even during the earliest days of the United States, that administrative discretion is necessary for government to operate,<sup>58</sup> one can reasonably posit that the framers envisioned federal preemption by executive action.

## 2. Textual Arguments Regarding Meaning of “Laws of the United States”

Both Clark and Rubenstein attribute little significance to the fact that the drafters of the Supremacy Clause changed the federal action capable of triggering preemption from “Acts of the Legislature of the United States made in pursuance of this Constitution” to “laws of the U. S. made in pursuance [of the Constitution].”<sup>59</sup> Each views this change as only stylistic and claims that the clause was meant to keep its prior construction, referring only to acts of the federal legislature.<sup>60</sup> But, as Professor Peter Strauss has pointed out, the most straightforward reading of the text would support a broader reading of the word “laws” than that given it by Clark and Rubenstein.<sup>61</sup> There seems to be no debate that problematic common law

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<sup>56</sup> Jim Chen, *Filburn’s Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 261 (1997) (“[E]conomic war among the states, after all, was the impetus for union: ‘If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.’” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in the judgment))).

<sup>57</sup> See THE FEDERALIST NO. 39, at 194 (James Madison) (Bantam Books 1982) (“It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government. . . . Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact . . .”).

<sup>58</sup> See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 45-49* (2012) (detailing various delegations of executive discretion during the initial Federalist period of the United States).

<sup>59</sup> James Madison, *Notes on the Constitutional Convention* (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 29, at 177, 183 (showing earlier “Acts” language); Madison, *supra* note 50, at 389 (quoting another source) (internal quotation marks omitted).

<sup>60</sup> Clark, *supra* note 6, at 1365 (characterizing the change as incidental to the addition of the Constitution to those documents that would be the supreme law of the land); Rubenstein, *supra* note 5, at 1154 (misattributing the change to the Committee of Detail, and stating that there is no evidence to suggest that the change was “anything other than stylistic”).

<sup>61</sup> Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1568–71 (2008).

edicts of state courts, laws of local governments, and actions by state executives are subject to preemption under the Supremacy Clause.<sup>62</sup> The Supremacy Clause, however, uses “Laws of any State,” to describe those actions of state and local government that would be preempted by supreme federal law.<sup>63</sup> Thus, it seems that the most consistent reading of the Clause would understand “Laws of the United States,” like “Laws of any State,” to refer to more than statutes passed by each respective legislature. In addition, the term “Law of the Land” later in the Clause, by its own reference to prior listed federal actions, includes more than just statutes.<sup>64</sup> Hence, the framers seemed aware that the term “law” includes more than just statutes.

The language of the Supremacy Clause also mirrors that of Article III, which provides federal jurisdiction over cases “arising under this Constitution, the Laws of the United States, and Treaties.”<sup>65</sup> Again, it seems obvious that federal jurisdiction must extend to disputes involving actions of the executive branch of the federal government. And no one has ever questioned such a reading of “federal question” jurisdiction.<sup>66</sup> Thus, the most consistent reading of the Supremacy Clause and Article III would interpret “Laws of the United States” to include actions by the executive branch authorized by federal statutes or the Constitution itself.

It would also seem significant that the framers thought it important enough to change the language to “Laws of the United States.” “Laws” is a broader term that seemingly encompasses more than just statutes passed by the legislature. The change from “Acts” to “Laws” was made on the floor of the Convention, along with the explicit addition of the Constitution to the list of federal actions that could preempt state law.<sup>67</sup> Both changes can be viewed to clarify that federal action capable of preempting includes more than just congressionally enacted statutes.<sup>68</sup>

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<sup>62</sup> Madison, *supra* note 38, at 28-29; Clark, *supra* note 6, at 1354 (discussing the new Supremacy Clause but only remarking on the addition of state constitutions when addressing the scope of state law subject to preemption).

<sup>63</sup> See Strauss, *supra* note 61, at 1568-69 (“[The] second use of ‘Laws’ [in the Supremacy Clause] embraces *state common law*.”).

<sup>64</sup> U.S. CONST., art. VI, cl. 2.

<sup>65</sup> U.S. CONST., art. III, § 2, cl. 1.

<sup>66</sup> *Cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382-83 (1821) (“[The federal judiciary] is authorized to decide all cases of every description, arising under the constitution or laws of the United States. . . . [Furthermore, any such case] is cognizable in the Courts of the Union, whoever may be the parties to that case.”).

<sup>67</sup> Madison, *supra* note 50, at 389.

<sup>68</sup> This view comports with the drafting history of the Supremacy Clause, during which the framers consistently broadened the clause from Luther Martin’s initially adopted proposal. That proposal included language limiting preemptive effect to acts and treaties that “relate to the said States, or their Citizens and Inhabitants.” Journal of the Constitutional Convention, *supra* note 38, at 22. This limiting language was removed by the Committee of Detail. Compare Committee of Detail, I, in 2 FARRAND’S RECORDS, *supra* note 29, at 129, 132 (showing Martin’s language in the resolutions submitted to the Committee of Detail), with Madison, *supra* note 59, at 183 (the Supremacy Clause without Martin’s

Rubenstein further relies on the fact that there is no record of any discussion of the change to conclude that it was not significant.<sup>69</sup> But the Convention participants were well aware of the import of their editing actions.<sup>70</sup> Furthermore, the framers made numerous floor amendments without debate that had obvious substantive effect.<sup>71</sup> Even edits by the Committee of Style likely reflected substantive elements.<sup>72</sup>

In addition, attributing any significance to the lack of debate suffers from a problem similar to one originally identified by Professor Henry Monaghan in response to Clark's conclusion that "Laws of the United States" did not include the common law decisions of the federal courts.<sup>73</sup> Monaghan admitted that Clark's conclusion was probably true, although not for the reasons Clark gave and not with the effect of preventing Supreme Court decision from overruling state common law.<sup>74</sup> Rather, common law was not seen as the law made by any sovereign, but some natural truth that

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language requiring relatedness). The broadening of the clause by the Committee may have reflected a compromise between the Martin language and the proposal by Charles Pinckney, which would have conditioned the operation of every state law on approval by Congress. Committee of Detail, III, in 2 FARRAND'S RECORDS, *supra* note 29, at 134, 134 n.3, 135 ("But no Bill of the Legislature of any State shall become a law till it shall have been laid before S. & H. D. in C. assembled and received their Approbation.").

<sup>69</sup> Rubenstein, *supra* note 5, at 1154-55.

<sup>70</sup> See James Wilson, Remarks on the Constitution at the Convention of Pennsylvania, as reprinted in 1 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 465, 467 (Harper & Bros. 1861) ("[Because of] the conflicts and difficulties which must arise from the many and powerful causes [participating at the Convention] . . . it is hopeless and impracticable to form a constitution which, in every part, will be acceptable to every citizen, or even to every government, in the United States; and that all which can be expected is, to form such a constitution as, upon the whole, is the best that can possibly be obtained.").

<sup>71</sup> See, e.g., James Madison, Notes on the Constitutional Convention (Aug. 25, 1787), in 2 FARRAND'S RECORDS, *supra* note 29, at 412, 417 (adding to the Supremacy Clause treaties "which shall be made" (internal quotation marks omitted)); James Madison, Notes on the Constitutional Convention (Sept. 10, 1787), in 2 FARRAND'S RECORDS, *supra* note 29, at 557, 559 (making two-thirds of the states the requirement to call a constitutional convention); James Madison, Notes on the Constitutional Convention (Aug. 31, 1787), in 2 FARRAND'S RECORDS, *supra* note 29, at 475, 479-80 & n.13 (making nine states the requirement to ratify and "commenc[e] proceedings under this Constitution" (internal quotation marks omitted)).

<sup>72</sup> Some edits by the Committee on Style were even seen at the time of ratification as communicating fundamental attributes of the Constitution. For example, the Committee of Style changed the "supreme law of the several states" to the "supreme law of the land." At the time, this was seen as signaling that the Constitution was not a confederation of states, but rather created a new country accountable directly to its citizens. One newspaper published commentary that the change to "law of the land" signaled "the design of erecting one consolidating government universally pervading the land, and to be executed independant [sic] of the States and of course from necessity and on purpose abolishing them gradually . . ." Luther Martin, *Observations Published in the Maryland Gazette* (June 3, 1788), in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 291, 294-95 (James H. Hutson ed., 1987).

<sup>73</sup> Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 779 (2010).

<sup>74</sup> *Id.* at 740-41.

the courts discovered.<sup>75</sup> So although it probably would not come within the original understanding of the phrase “Laws of the United States made pursuant to the Constitution,” the Supreme Court would have understood that its reading of common law would trump that of state courts simply by the fact that the Supreme Court reviewed those courts for legal error.

Similarly, the framers likely would not have considered it controversial to include administrative action as capable of preempting state law because, at the time the Constitution was drafted, it was assumed that Congress would make the major policy decisions underlying administrative action.<sup>76</sup> That is, although the framers undoubtedly understood that the executive branch would have to exercise discretion to implement statutes,<sup>77</sup> the extent to which statutes authorized such discretion with respect to regulation of private conduct was much more limited in 1787 than it later came to be understood, especially after the New Deal.<sup>78</sup> For that reason, a lack of a large reaction to the change from “Acts” to “Laws” in the Supremacy Clause is not surprising.

The point of this argument is that those in the framers’ time likely understood that actions of the executive branch involve exercises of discretion that could preempt state law, but they would not have expected such actions to result in outcomes far beyond those envisioned by the statute authorizing the action.<sup>79</sup> In essence, what creates the concern about agency preemption

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<sup>75</sup> See *id.* at 741, 778-81.

<sup>76</sup> See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1276-77 (2006) (“Had Federalist Congresses done little, or done virtually everything via self-executing laws, the issue of political control of administration and the techniques by which it might be accomplished need not have loomed large in the early Republic. But this was not the pattern. The sheer range of activities attended to in the congressional sessions that make up the first volume of the *United States Statutes at Large* is astonishing.”). But see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1733-34 (2002) (asserting that the Framers were more afraid of the legislature usurping powers belonging to other branches than with delegation of authority to the executive).

<sup>77</sup> See Madison, *supra* note 38, at 34 (“[I]n the administration of the [Executive Department] much greater latitude is left to opinion and discretion than in the administration of the [Judiciary].”); *cf.* Clinton v. City of New York, 524 U.S. 417, 466 (Scalia, J., concurring in part and dissenting in part) (despite the Constitution giving Congress the spending power, Congress has authorized the president to exercise discretion whether to spend on a particular item “since the founding of the Nation”).

<sup>78</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1677 (1975) (“So long as administrative power was kept within relatively narrow bounds and did not intrude seriously on vested private interests, the problem of agency discretion could be papered over by applying plausible labels, such as ‘quasi-judicial’ or ‘quasi-legislative’ . . . But after the delegation by New Deal Congresses of sweeping powers to a host of new agencies under legislative directives cast in the most general terms, the broad and novel character of agency discretion could no longer be concealed behind such labels.” (footnotes omitted)); *cf.* MASHAW, *supra* note 58, at 1-17 (explaining how administrative law early in our nation’s history reflected the need to build and secure the federal state as an entity, and less on regulating private conduct, which characterizes post New-Deal regulatory activity that is likely to be subject to judicial review of agency discretion).

<sup>79</sup> See Rubenstein, *supra* note 5, at 1158-59.

of state law is not a changed perception of whether agency action falls within the “Laws of the United States,” but rather the greatly increased potential breadth of such action.<sup>80</sup> Although Clark elides this point, Rubenstein candidly admits it.<sup>81</sup> He opines that the courts were wrong to allow statutes to delegate so much discretion to agencies.<sup>82</sup> Rubenstein accepts Clark’s thesis that Senate involvement is crucial to preemption, but he believes that it should also be crucial to creation of all federal law, a proposition that is both at odds with current nondelegation doctrine and pragmatically impossible to maintain.<sup>83</sup> Having admitted that he lost the battle over the proper amount of Senate involvement necessary for the making of law, Rubenstein’s reading of “Laws of the United States” provides no additional ground to contend that somehow more Senate involvement is required for preemptive law.<sup>84</sup>

### 3. Tensions in Clark’s Position that Administrative Preemption Comes from Agency Authorizing Statutes

There is somewhat of an intellectual inconsistency in Clark’s position that agency regulations, being executive in nature and not “Laws of the United States,” cannot preempt state law in their own right, but that such regulations do preempt state law with which they conflict when they are authorized by a statute enacted by Congress.<sup>85</sup> The major problem with Clark’s position stems from his supposition that Congress makes the preemptive decision regarding regulations when it authorizes an agency to regulate.<sup>86</sup>

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<sup>80</sup> *Id.* at 1145-46 (“[T]here is a *conceptual* limit to congressional delegation—but it’s virtually toothless in application.”).

<sup>81</sup> *Id.* at 1143-44.

<sup>82</sup> *Id.* at 1153-54.

<sup>83</sup> Statutes cannot answer all potential questions that might arise upon application; execution of the law requires some level of executive discretion that in essence makes law. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 672 (1996) (“[V]irtually no law specifies everything: almost all laws create zones of discretion, zones in which faithful execution requires good faith judgment and choice.”).

<sup>84</sup> Rubenstein counters that the source of preemption power is the Supremacy Clause, and the source of power to delegate is Article I. Rubenstein, *supra* note 5, at 1167-68. But, the Supremacy Clause itself ties Congress’s Article I power to preemption by specifying that laws made pursuant to the Constitution preempt conflicting state law. *Cf.* Strauss, *supra* note 61, at 1570 (finding persuasive Clark’s argument that the Supremacy Clause requires the Supreme Court to determine that federal law is substantively legitimate before it can preempt state law (citing Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 116-19 (2003))).

<sup>85</sup> Rubenstein essentially critiques Clark on the same grounds. *See* Rubenstein, *supra* note 5, at 1157 (“To say that Congress preempts in such cases is too far a stretch.”). We provide some needed details that flesh out the argument why this is so.

<sup>86</sup> *See id.* at 1156-57.

When Congress enacts a statute authorizing agency regulation, it generally has some idea of the scope of the regulatory program it creates and might entertain a belief about whether states should have a role in it. But when Congress enacts legislation authorizing agency regulation, it often has little idea what the ultimate regulation adopted by the agency will provide.<sup>87</sup> Because such regulations often establish significant policies with which state law might conflict, Congress would have no way to envision what state law is preempted. It seems odd to attribute to Congress a determination of the propriety for preemption of state law when Congress would have no means of evaluating either the impact of preemption on state sovereignty or any benefits of preventing state action for the nation as a whole. Moreover, other than when statutes explicitly preempt state law, there is little evidence that Congress considers the potential preemptive impact of regulations when it authorizes agencies to issue them.<sup>88</sup> This undermines Clark's position that preemption derives from some affirmative exercise of congressional considerations rather than from the valid regulation itself.<sup>89</sup> Clark's understanding of "Laws of the United States" in the Supremacy Clause, taken to its logical extension, would suggest that agency regulations cannot preempt even state law that would conflict with or be an obstacle to them unless the statute authorizing the regulations explicitly provided for them to be preemptive. But this is not the position to which Clark subscribes.<sup>90</sup>

The tension in Clark's position, vis-à-vis his interpretation of the Supremacy Clause, is compounded by the fact that statutes that do not have savings or preemption clauses, but that authorize an agency to issue regulations, leave significant discretion to the agency to determine whether a particular regulation will conflict with state law. The agency can alter the preemptive effect by the nature of the substantive standard it imposes when it writes the regulation. For example, an agency can choose a minimal performance standard, which imposes only a regulatory floor; alternatively it can impose something akin to a design standard, which mandates conduct

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<sup>87</sup> See Arthur W. Murphy & D. Bruce La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 434 (1976) ("Although the precise effect of the preemption doctrine on particular state laws and regulations is frequently hard to predict, the resolution of conflicting assertions of authority is relatively easy where Congress has addressed itself to the issue of the extent to which state activity must be displaced.").

<sup>88</sup> See Rubenstein, *supra* note 5, at 1159.

<sup>89</sup> See Clark, *supra* note 6, at 1433 ("Administrative rulemaking is suspect to the extent that it displaces state law without adhering to the constitutionally prescribed lawmaking procedures designed to safeguard federalism. If the underlying statute defines the scope of preemption, then this objection disappears. . . . [C]ourts should displace state law only when the statute itself requires that result.").

<sup>90</sup> *Id.* at 1334-36, 1434.

or outcomes with more particularity.<sup>91</sup> Regulatory floors leave room for state law to impose stricter standards; design standards do not.<sup>92</sup>

#### 4. Rubenstein's Gambit Arguing that Administrative Action Can Never Preempt State Law

Rubenstein avoids the tension between Clark's reading of the Supremacy Clause and his position on the preemptive impact of agency action by carrying Clark's reading of the Supremacy Clause to its logical conclusion with respect to the preemptive effect of agency action.<sup>93</sup> As a result, Rubenstein reasons that agency action can have no preemptive effect, whether or not Congress has statutorily provided for such regulations to preempt state law.<sup>94</sup> Thus, Rubenstein would hold that statutory delegation to agencies to preempt state law is unconstitutional.<sup>95</sup> In addition, he would give no preemptive effect to agency substantive regulations, allowing a state to pass laws permitting regulated entities within the state to ignore federal regulations if the state so desired.<sup>96</sup> Rubenstein's position, however, would threaten the workability of the federal government. Furthermore, it is unsupported by the traditional preemptive effect given to administrative action since the ratification of the Constitution.

The policy implications of Rubenstein's position seem inconsistent with the problems that motivated the Constitutional Convention in 1787.<sup>97</sup> The framers understood the Constitution as providing mechanisms to pre-

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<sup>91</sup> On the distinction between performance and design standards, see *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 319, 327 n.57 (1981) ("A 'performance' standard differs from a 'design' standard in that the former specifies only the objective to be achieved, not the means of achieving it."). See also Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 713 (2003) ("[W]hen setting standards, regulatory agencies usually select a point on a spectrum running from what might be considered 'pure' performance standards to 'pure' design standards, depending on the level of discretion afforded the targets of regulation.").

<sup>92</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1561-68 (2007).

<sup>93</sup> See Rubenstein, *supra* note 5, at 1155.

<sup>94</sup> *Id.* at 1164-65 ("[A] system without delegated supremacy is not only more consistent with the framers' vision but also conceptually feasible today.").

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1165 ("Agency action cannot trump a conflicting state law. Depending on the nature of the conflict, a state law will either supplement or trump conflicting agency standards within that state's jurisdiction.").

<sup>97</sup> Compare *id.* (listing the substantive implications of his proposal), with Chen, *supra* note 56, at 261 ("[E]conomic war among the states, after all, was the impetus for union: 'If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.'" (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in the judgment))).



vent state collective action problems that were evidenced by the states' history of behaving strategically to the detriment of the United States as a whole.<sup>98</sup> Formalists like Justice Scalia, Clark, and, for the purposes of his article on preemption, Rubenstein tolerate the delegation of rulemaking authority because a "certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."<sup>99</sup> Statutes cannot specify all the policy choices that are reflected in their implementation. There must be some slack in implementation or the policies encompassed within a statute could not be implemented at all.<sup>100</sup> In other words, actions implementing a statute will also reflect some policy choices left unspecified by that statute. Rubenstein's understanding—that states could ignore discretionary decisions by agencies—would allow states to countermand virtually every federal executive action, and thereby the statute underlying such action.<sup>101</sup> In Rubenstein's system of Constitutional order, with respect to administrative action the Supremacy Clause would work in reverse of how it currently operates: federal regulations would only have the force of law if they were not overridden by state and local laws. To preempt state laws, agencies would have to present their regulations to Congress for enactment into statute.<sup>102</sup> Given the need for executive implementation of virtually all regulatory law, Rubenstein's proposal pragmatically would substitute congressional negation, which the framers rejected, for the Supremacy Clause.<sup>103</sup>

Rubenstein suggests that states generally are unlikely to attempt to negate agency regulations.<sup>104</sup> He supports his argument by noting that, to date, there have been few instances of direct inconsistency between state and federal regulations.<sup>105</sup> Therefore, he predicts that direct conflicts are "likely to be relatively rare" under his proposal.<sup>106</sup> He also posits that states would hesitate to raise the ire of Congress by pushing against preemption too

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<sup>98</sup> See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 144-50 (2010) (arguing that the eighteen enumerated powers of Congress in Article I of the Constitution together provide a coherent set of tools to combat state collective action problems).

<sup>99</sup> *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 475 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)) (internal quotation marks omitted). As already noted, however, Rubenstein does not accept broad delegation of discretion to agencies; he merely accepts that the courts today are not about to prohibit them. Rubenstein, *supra* note 5, at 1145-46.

<sup>100</sup> See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 71-79 (1983) (detailing trade-offs that occur between adopting a precise rule and a standard that leaves more slack in implementation).

<sup>101</sup> See Rubenstein, *supra* note 5, at 1165, 1171-72.

<sup>102</sup> See Strauss, *supra* note 61, at 1591 (explaining that Clark's position would essentially reject delegation of regulatory authority to agencies "in any context impacting state law").

<sup>103</sup> James Madison, *Notes on the Constitutional Convention* (June 8, 1787), in 1 FARRAND'S RECORDS, *supra* note 29, at 164, 168.

<sup>104</sup> See Rubenstein, *supra* note 5, at 1178-79.

<sup>105</sup> *Id.* at 1171.

<sup>106</sup> *Id.*

hard.<sup>107</sup> Rubenstein thereby implies that states will not overly resist administrative regulation out of fear of congressional reprisal.<sup>108</sup> He further reasons that regulation requires a commitment of resources, and that states might not want to make that commitment.<sup>109</sup>

With respect to congressional reprisal against states that throw wrenches into the implementation of federal programs, Rubenstein overestimates the likelihood that Congress will overcome the enormous legislative inertia to negate state law.<sup>110</sup> But more fundamentally, the true threat of Rubenstein's position can be gauged by some states' recent reactions to federal statutes and Supreme Court constitutional holdings with which they disagreed.<sup>111</sup> And by that measure, the picture is far from the one Rubenstein paints.

For example, in protest of a woman's federally protected right to choose to terminate her pregnancy, some states have enacted statutes that clearly contravene settled constitutional standards that the Supreme Court has given no indication it is about to change.<sup>112</sup> Others have passed laws expressing opposition to federal gun control laws.<sup>113</sup> Missouri's state legislature went so far as voting to prohibit federal officials from enforcing such laws in the state,<sup>114</sup> which, but for the governor's veto, would have set up the fanciful prospect of local police and sheriffs arresting federal Bureau of Alcohol, Tobacco, Firearms and Explosives agents.<sup>115</sup> State legislators knew that courts would deem these statutes unconstitutional and hence legally

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<sup>107</sup> *Id.* at 1178.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1170-71.

<sup>110</sup> Cf. Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1390 n.114 (2010) (agreeing that congressional override of judicial interpretations disfavoring preemption is unlikely, but positing that for one who supports a strong norm of federalism, that is not a bad thing). Congressional consideration is unlikely if the matter is not of great national importance, and if the matter is nationally important, state resistance often will reflect a partisan disagreement on the issue that almost certainly would doom any legislative effort to override state law.

<sup>111</sup> See, e.g., Lizette Alvarez & Robert Pear, *Several States Undercutting Health Care Enrollment*, N.Y. TIMES, Sept. 18, 2013, at A11; John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES, Mar. 27, 2013, at A1; Jonathan Martin, *Health Law Is Dividing Republican Governors*, N.Y. TIMES, Nov. 21, 2013, at A14; Michael Martinez, *State Battles Intensify on Access to Guns*, CNN (Sept. 23, 2013, 6:38 PM), <http://www.cnn.com/2013/09/12/politics/gun-control-state-by-state/index.html>; Robert Pear, *Majority of Governors Refuse to Set Up Health Exchanges*, N.Y. TIMES, Dec. 15, 2012, at A13.

<sup>112</sup> See Eligon & Eckholm, *supra* note 111; see also *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 909 (D.N.D. 2013) (noting universal judicial rejection of recent state efforts to condition abortions in a manner that creates significant barriers to their availability).

<sup>113</sup> Martinez, *supra* note 111.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (reporting that the Missouri legislature passed a measure making enforcement of federal gun control law illegal, but that Governor Nixon vetoed it, stating that the law was an "unnecessary and unconstitutional attempt to nullify federal laws" (internal quotation marks omitted)).

inoperative.<sup>116</sup> Of course states can pass statutes that raise issues about the bounds of constitutional rights and the meaning of statutory provisions, hoping to generate cases and get judges to nudge the law in the direction they desire. But the examples above had no hope of being upheld upon judicial review. They were passed as symbolic statements of these legislatures' opposition to federal law.<sup>117</sup>

If state legislatures are willing to devote the time and resources to enacting such symbolic legislation and legislation aimed at influencing federal law at the margin, one can reasonably surmise that they would be more emboldened if they knew that their efforts actually would negate federal regulations. State efforts to undermine the Affordable Care Act ("ACA") signal the likely resistance that states would mount if they had the power to override agency action.<sup>118</sup> The great efforts to which some states have gone to undermine the operation of the ACA advise significant skepticism about Rubenstein's suggestion that states would not lightly defy federal regulations. Some states have declined hundreds of millions of federal dollars by refusing to expand their Medicaid coverage in accordance with the ACA.<sup>119</sup> Many states have refused to set up state-run insurance exchanges even though that refusal forfeits state input into the structure of such exchanges.<sup>120</sup> And some states have adopted legally questionable, unduly burdensome licensing requirements and restrictions on navigators, whose job is to help individuals sign up for health insurance on insurance exchanges.<sup>121</sup> These examples suggest states would likely go further than they have already to resist federal law when they have constitutional options that can prohibit the operation of federal regulation.

In addition, Rubenstein argues that a prohibition on administrative preemption is good policy.<sup>122</sup> He maintains that it is just as likely that uniform federal regulation will be inferior to an overlap of federal and state regulation as vice versa.<sup>123</sup> Hence, he sees the choice of whether state law trumps agency regulation as a default rule that would encourage dialogue between agencies and states.<sup>124</sup> He opines that agencies will not take states seriously in such a dialogue unless states can veto agency regulations.<sup>125</sup>

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<sup>116</sup> Cf. Eligon & Eckholm, *supra* note 111, at A1, A12.

<sup>117</sup> See Martinez, *supra* note 111.

<sup>118</sup> See Martin, *supra* note 111, at A14.

<sup>119</sup> See *id.*; see also Alvarez & Pear, *supra* note 111, at A11.

<sup>120</sup> See Pear, *supra* note 111, at A13.

<sup>121</sup> See Alvarez & Pear, *supra* note 111, at A11; see also *St. Louis Effort for Aids v. Huff*, 996 F. Supp. 2d 798 (W.D. Mo. 2014) (finding Missouri's licensing requirements for and regulation of health insurance navigators preempted by the ACA).

<sup>122</sup> Rubenstein, *supra* note 5, at 1129.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1173.

<sup>125</sup> *Id.* at 1177.

This argument, however, fails to take into account the safeguards against arbitrary and unpopular federal regulatory action. The likelihood that exclusive federal regulation is better than overlapping state and federal authority significantly increases if the agency has deliberately chosen to act in a preemptive manner.<sup>126</sup> And federal administrative procedure, as well as political and judicial review of agency action, requires agencies to act deliberately.<sup>127</sup> In addition, states have significant means to protect their regulatory authority.<sup>128</sup> Agency preemptive choices must survive both political pressure from state congressional delegations<sup>129</sup> and arbitrary and capricious review from challenges brought by state officials and interest groups opposed to federal regulation.<sup>130</sup> An agency decision that withstands both arbitrary and capricious review and political pressure, while not necessarily optimal, almost always is at least justifiable in terms of both objective reasoning and political palatability.

In addition, in opining that mistakes of too much and too little preemption are likely to occur equally often, Rubenstein neglects one of the most fundamental lessons of *McCulloch v. Maryland*.<sup>131</sup> Federal and state governments, while both representing sovereigns, do not stand in a perfectly reciprocal relationship.<sup>132</sup> By undermining federal law, one state can interfere with the implementation of the will of the nation, and voters in the other states, having no say over the government of the intransigent state, will not be able politically to influence that state's action.<sup>133</sup> The voters of any particular state, however, are represented at the federal level through Congress and the election of the president.<sup>134</sup> If they dislike federal policy, their recourse is to press their cause politically.

Rubenstein might respond that states are not represented before federal agencies. But they are, and perhaps more so than any other interest group

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<sup>126</sup> See Galle & Seidenfeld, *supra* note 1, at 1973-74.

<sup>127</sup> See *id.* at 1939-40.

<sup>128</sup> See *id.* at 1973 ("The states have proven to be effective at influencing agencies to preserve their state prerogatives."); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 774-75 (2004) (noting that federal agencies may hesitate to alienate state regulators because, in implementing federal programs, agency staff often have to cooperate with those regulators).

<sup>129</sup> See Mendelson, *supra* note 128, at 775 ("[A]gency officials recognize the political costs that may come—often through the congressional process—from not taking state concerns into account.").

<sup>130</sup> Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1053 (2011) ("In a world of hard look review . . . political constraints are still present, yet legal and technocratic considerations constrain the agency as well.").

<sup>131</sup> 17 U.S. 316 (1819).

<sup>132</sup> *Id.* at 410. ("They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.").

<sup>133</sup> *Id.* at 431-33.

<sup>134</sup> *Id.* at 431 ("In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.").

affected by a wide gamut of agency decisions.<sup>135</sup> First, they can participate in agency proceedings just like any other affected person.<sup>136</sup> Second, through various structural mechanisms, states have direct influence on members of Congress,<sup>137</sup> and agencies do not lightly ignore Congress, especially when subject to the threat of oversight hearings and appropriations battles.<sup>138</sup> Third, states can have a disproportionate influence on presidential policies.<sup>139</sup> For example, given the politics of electoral presidential elections, swing states wield an enormous influence on presidential policy

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<sup>135</sup> Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2075 (2008) (“Numerous factors, such as congressional oversight, federal officials’ ties to state regulators, lobbying by state political organizations, and dependence on state implementation, can all serve to give state regulatory interests leverage in federal agency decisionmaking.”). States also have associations organized to represent the interests of various state and local government institutions, which are very effective in lobbying Capitol Hill and the White House. See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1121 (1997). A more sophisticated argument is that different organizations that represent the states as an institution may take opposing positions or may not raise federalism concerns regarding federal agency regulation because their members will disagree about the desirability of such regulation. See *id.* at 1123-24. But one may question the importance of “abstract federalism” interests if states are willing to sacrifice representation of such interests in order to pursue their policy preferences in particular agency proceedings. See Galle & Seidenfeld, *supra* note 1, at 1973 (“[T]he costs of shortchanging abstract federalism in most cases will be small compared to the effect of federalism on programmatic effectiveness.”); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948 (1994) (“The term ‘states’ or ‘federalism’ becomes a code word for particular substantive positions, because that is what we really care about.”).

<sup>136</sup> 1 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* 354 (3d ed. 2010).

<sup>137</sup> Thus, the fact that each state has equal representation in the Senate goes beyond merely ensuring that states’ institutional interests are likely to be considered in Congress, but supports states’ influence in administrative proceedings as well. In addition, state legislatures can influence the delegations they send to the House of Representatives by drawing congressional districts. Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 902 (“[T]he ability of states to influence their representatives through redistricting can actually help states to protect their regulatory authority in the era of big government.”). Finally, congressional representatives are beholden to their state political party for their nominations and campaign support. Cf. Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 362 (2010) (“[T]he political safeguards of federalism are arguably maintained today by the continued role of states in congressional elections, lobbying by organizations that represent state interests, the influence of state political party activists on federal lawmakers, and Congress’s recognition that the states are needed to carry out cooperative federal programs.”).

<sup>138</sup> Congress has significant ability to limit agency policy prerogatives, especially through the appropriations process. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 461-62 (asserting that use of appropriations is a potent technique by which Congress “asserts control over the administrative state”); see also Jason A. MacDonald, *Limitation Riders and Congressional Influence Over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 766 (2010) (“[A] substantial number of limitation riders are employed annually to influence substantively important policy decisions . . .”).

<sup>139</sup> See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1346 (2013).

choices.<sup>140</sup> On issues that divide the country along state lines, swing states' preferences often reflect middle ground positions between those of states that support extreme positions.<sup>141</sup> In essence, the president's policies are likely to be greatly influenced by the position of the "median" state rather than the median voter.<sup>142</sup> And certainly agencies are greatly influenced by White House preferences.<sup>143</sup> In short, states already can engage the agency in a conversation that gives them significant means to protect their interests when such preservation is in the national interest.

### C. *Understanding of Administrative Preemption in the Early Years of the Nation*

Having described the textual and structural weaknesses of interpreting the Supremacy Clause to omit agency action from the class of federal law that can preempt state law, this Article now proceeds to show that preemptive effect of such action was understood at the time the Constitution was ratified.

#### 1. States Taxing Power and *McCulloch v. Maryland*

Since almost the inception of the United States, courts have recognized the need to credit discretionary actions of the federal executive branch against conflicting state law.<sup>144</sup> Consider the case of *McCulloch v. Maryland*, which upheld Congress's authority to establish the Second Bank of the United States, and held that Maryland could not tax the Baltimore

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<sup>140</sup> See *id.* ("[T]he Electoral College . . . leads to outsized influence for a handful of swing states . . ."); see also Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1234 (2006) (arguing that because of the winner-take-all nature of most states' systems of awarding electoral college votes, the president may have a greater tendency to favor parochial policies than does Congress).

<sup>141</sup> See John R. Wright, *Pivotal States in the Electoral College, 1880 to 2004*, 139 PUB. CHOICE 21, 33, 35-36 (2009).

<sup>142</sup> Because the Electoral College reflects the influence of states' populations, swing states may not technically have as many states on one side of their position on important issues as on the other. But, by the same token, because the Electoral College also reflects the influence of equal representation in the Senate, swing states also are not likely to have states with equal populations on one side of their position as on the other. The point is, however, that it is the positions of states, rather than merely the people, that drive presidential politics. See Nzelibe, *supra* note 140, at 1234-42.

<sup>143</sup> See, e.g., William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1095-96 (2002); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 14 (1994).

<sup>144</sup> MASHAW, *supra* note 58, at 68-69; Paul E. McGreal, *Some Rice with your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 830 (1995).

branch of the Bank.<sup>145</sup> The statute creating the Bank was controversial.<sup>146</sup> To protest the Bank, many states had decided to tax extensively any branch created in that state.<sup>147</sup> For example, Tennessee imposed a \$50,000 tax on any bank other than a state-chartered bank doing business in the state, and Kentucky passed a \$60,000 annual tax on any branch of the Bank of the United States.<sup>148</sup> These states thus sought to prevent the Bank of the United States from establishing a branch within their boundaries.

The language of the federal statute authorizing the Bank provided that “it shall be lawful for the directors of the said corporation to establish offices of discount and deposit, wheresoever they shall think fit, within the United States or the territories thereof.”<sup>149</sup> *McCulloch* then has all the elements of Rubenstein’s problem: delegation of powers to decide where to locate branches of the Bank,<sup>150</sup> directors’ discretion over where to locate the branches,<sup>151</sup> a competing state interest in keeping branches out of the state,<sup>152</sup> and a state’s attempt to negate the statutorily authorized action of the directors.<sup>153</sup>

Maryland argued, *inter alia*, that even if Congress possessed the power to place a bank in one of the states, Congress should determine the placement of that bank before a state may be precluded from exercising its sovereign power over that placement.<sup>154</sup> Essentially, arguing before the Supreme Court shortly after the founding era of our nation, Maryland raised Rubenstein’s exact position: that actions by statutory delegates of federal power cannot limit a state’s exercise of its own sovereign power.<sup>155</sup> In the words of Joseph Hopkinson, the lead attorney for Maryland,

Congress is . . . the only [tribunal] in which [the power to override state sovereign power] may be safely trusted; the only one in which the States to be affected by the measure, are all fairly represented. If this power belongs to Congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens . . . . The establishment of a bank in a State, without its assent; without regard to its

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<sup>145</sup> *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819).

<sup>146</sup> The Bank existed for only twenty years, dying when President Andrew Jackson refused to renew the charter. Harold J. Plous & Gordon E. Baker, *McCulloch v. Maryland: Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 712 (1957).

<sup>147</sup> *Id.* at 717.

<sup>148</sup> *Id.*

<sup>149</sup> An Act to Incorporate the Subscribers to the Bank of the United States, ch. 44, 3 Stat. 266, § 11, ¶ 14 (1816).

<sup>150</sup> *McCulloch*, 17 U.S. at 334.

<sup>151</sup> Lest one view locating branches of the bank as unimportant, see MASHAW, *supra* note 58, at 47, which treats as significant that, for the First Bank of the United States, “all of the Bank’s operating policies—including when and where to establish branches—were left to the regulations to be adopted by the Bank’s directors . . . .”

<sup>152</sup> *McCulloch*, 17 U.S. at 335-37.

<sup>153</sup> *Id.* at 329.

<sup>154</sup> *Id.* at 330-31.

<sup>155</sup> *Id.* at 360.

interests, its policy, or institutions, is a higher exercise of authority, than the creation of the parent bank; which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the States, than those wide spreading branches, planted every where, and influencing all the business of the community. Such an exercise of sovereign power, should, at least, have the sanction of the sovereign legislature to vouch that the good of the whole requires it, that the necessity exists which justifies it.<sup>156</sup>

Under Rubenstein's theory, Congress cannot delegate the power to locate a branch of the bank if the exercise of such power is inconsistent with state law.<sup>157</sup> Even after the decision to locate a branch is made by the agency, if a state later disagrees, then Rubenstein's position would require Congress to revisit the bill and specifically authorize the preemption.<sup>158</sup>

Chief Justice John Marshall, however, rejected Maryland's reasoning as follows:

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.<sup>159</sup>

Thus, in the first case to test the supremacy of federal over state law, Chief Justice Marshall recognized how debilitating it would be if an agency, authorized to act by statute, had to go back to Congress every time it sought to implement the statute in a manner that conflicts with state law.<sup>160</sup>

One might object to our characterization of *McCulloch* as preemption by administrative action. The statute approved the Bank charter, which in turn authorized establishing branches as directors saw fit.<sup>161</sup> Although the direct conflict with Maryland law was engendered by the directors creating a Baltimore branch, certainly Congress understood and had authorized the establishment of branches within state boundaries, and not just in the District of Columbia or federal territories.<sup>162</sup> Thus, one might instead characterize preemption of state taxation or regulation of branches of the Bank as explicitly authorized by Congress. This latter characterization would pro-

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<sup>156</sup> *Id.* at 336-37.

<sup>157</sup> Rubenstein, *supra* note 5, at 1129.

<sup>158</sup> *Id.* at 1129-30.

<sup>159</sup> *McCulloch*, 17 U.S. at 432.

<sup>160</sup> *Id.* at 327-29.

<sup>161</sup> An Act to Incorporate the Subscribers to the Bank of the United States, ch. 44, 3 Stat. 266, § 11, ¶ 14 (1816).

<sup>162</sup> *McCulloch*, 17 U.S. at 399-400.



vide some support for Clark's view that preemption by federal regulation follows from congressional intention, especially if one believed that all delegations involved actions directly envisioned by Congress.<sup>163</sup> This characterization might also lead to a limited notion of administrative preemption—applying such preemption only when something like the particular preemptive regulation was contemplated in the text of the statute. But drawing a line between a preempting exercise of discretion that is executive in nature and that which is policy oriented (and thus must be left to Congress) calls for the precise determination that the Court has refused to make in the context of nondelegation challenges to agency exercises of power.<sup>164</sup> Even Justice Scalia, who formally distinguishes between exercises of executive and legislative discretion, has admitted that having the courts draw a line between the two is infeasible.<sup>165</sup>

## 2. The Progress Clause and the Patent Act of 1790

In addition, other examples of administrative preemption undermine any claim that such preemption is limited to agency choices that could be envisioned by Congress. In particular, the early history of the patent system in the United States countermands such a limited reading of executive preemptive power.<sup>166</sup> Although the notes on the Constitutional Convention do not explain why the framers drafted the Progress Clause of the Constitution as they did,<sup>167</sup> there is manifest evidence that the framers saw the power as imperative if the United States was to take advantage of scientific invention.<sup>168</sup>

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<sup>163</sup> See Clark, *supra* note 6, at 1435-36.

<sup>164</sup> See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1543-44 (2008) (asserting that the Court has declined to enforce the nondelegation doctrine because of "anxiety about its own competence to judge when a statute is so vague or open-ended that it effectively transfers legislative power to an agency or court"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321 (2000) ("[J]udicial enforcement of the nondelegation doctrine would raise serious problems of judicial competence . . .").

<sup>165</sup> See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("[I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.").

<sup>166</sup> See An Act to Promote the Progress of Useful Arts, ch. 7, 1 Stat. 109, § 1 (1790).

<sup>167</sup> The "Progress Clause" grants to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." U.S. CONST., art. I, § 8, cl. 8. The power of Congress to encourage the useful arts was among ten additional enumerated powers introduced by Charles Pinckney, and most of the debate that day centered around whether Congress could authorize standing armies. See James Madison, *Notes on the Constitutional Convention* (Aug. 18, 1787), in 2 FARRAND'S RECORDS, *supra* note 29, at 324, 324-33.

<sup>168</sup> See, e.g., THE FEDERALIST NO. 43 (James Madison).

Because of their experience with the King of England's grants of monopolies, colonists generally were skeptical of such grants.<sup>169</sup> After gaining independence, however, states saw encouragement of technological development and artistic expression as exceptions that warranted these grants.<sup>170</sup> Thus states commonly granted monopolies to those within their boundaries responsible for invention, importation, or effective development of technological breakthroughs.<sup>171</sup> During the period under the Articles of Confederation, Congress recognized the importance of encouraging such development, and passed a resolution recommending that the states develop copyright systems.<sup>172</sup> Technology such as the steamship, however, greatly improved the ease with which producers could move goods from one locale to another, and even from one state to another. This mobility of goods threatened the efficacy of state-by-state grants of monopolies over new technology.<sup>173</sup> State-granted monopolies were not of great value if individuals in one state could simply go to a neighboring state to obtain goods whose production relied on the new technology. Competing claims to the right to use a technology interfered with the development of the technology. Developers of uses for technology therefore rushed to obtain patents from several states before potential competitors might beat them to it.<sup>174</sup> Furthermore, different state standards for granting patents meant that different developers received patents for the same technology in different states, which fueled continued controversy over development rights.<sup>175</sup>

The inefficiency of having to file in several states and the deterrent effect of competing patent claims on technological development discouraged the utility of state patents and was a major impetus for the inclusion of the power "To promote the Progress of Science and useful Arts"<sup>176</sup> in Article

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<sup>169</sup> VICTOR S. CLARK, *HISTORY OF MANUFACTURES IN THE UNITED STATES: 1607-1860*, at 52 (1916) (noting pure monopoly grants for industries dying out in the colonies by 1750).

<sup>170</sup> *Id.* at 49.

<sup>171</sup> WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 104-06 (2d ed. 1829) ("In some of the states, prior to the adoption of the general Constitution, acts of the legislature in favour of meritorious discoveries and improvements, had been passed; but their efficacy being confined to the boundaries of the states, was of little value, and there can be no doubt that, as soon as congress legislated on the subject, (which was as early as the second session, 1790,) all the state provisions ceased . . .").

<sup>172</sup> Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (5 Part I)*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 615, 636 (1996).

<sup>173</sup> Edward C. Walterscheid, *The Early Evolution of the U.S. Patent Law: Antecedents (5, Part II)*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 665, 668-71 (1996) (stating that the earliest known multistate patent grant was in 1779 to Henry Guest, inventor of a process to make currier's oil).

<sup>174</sup> *Id.* at 672-84 (tracing the patent race between John Fitch, James Rumsey, and Arthur Donaldson regarding the steamboat).

<sup>175</sup> *Id.* at 673, 675 (Rumsey was granted patents in Virginia, Maryland, and Pennsylvania for his "stream boat," but not in New York, New Jersey, North Carolina, South Carolina, and Georgia. Further, Fitch obtained patents for a steamboat in Pennsylvania and Virginia, but not Maryland).

<sup>176</sup> U.S. CONST. art. I, § 8, cl. 8.

I's enumeration of Congress's power.<sup>177</sup> The point, however, should not be overstated.<sup>178</sup> States' continued issuance of patents after the Constitution was ratified suggests that the Constitution did not mean to prohibit states from granting monopoly rights to develop technology.<sup>179</sup> But state powers to grant such rights were distinct from federal powers. States often granted monopoly rights to a person who imported an existing new technology to the state from overseas or who promised to develop such existing new technologies most efficaciously,<sup>180</sup> but the federal patent system focused on initial invention.<sup>181</sup> The most accepted reading of the Progress Clause allows Congress to grant exclusive use rights for limited periods only to inventors.<sup>182</sup> Although this is a more limited power than that generally recognized as being within the power of the sovereign states, the impetus for the power left no doubt that when a federal patent conflicted with a state-granted license, the state license had to yield.<sup>183</sup>

With respect to the thesis of this Article, the most interesting point about the early federal patent power is contained in the Patent Act of 1790, enacted during the second session of the First Congress.<sup>184</sup> That Act authorized the secretary of state, the secretary of the department of war, and the attorney general to determine whether the patent applicant "invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein and not before known or used."<sup>185</sup> If that was so, then a patent was to be granted if any two of the cabinet officials "deem[ed] the invention or discovery sufficiently useful and important."<sup>186</sup> In essence, the grant of a patent did not simply entail the application of objective standards, but rather depended on the discretion of the officials named over matters

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<sup>177</sup> See THE FEDERALIST NO. 43, at 239 (James Madison) (E. H. Scott ed. 1898) ("The States cannot separately make effectual provision for [the right of inventors to their inventions] . . ."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1147 (1833) ("[I]nventors . . . would have been subjected to the varying laws and systems of the different states on [patents] . . .").

<sup>178</sup> See generally Camilla A. Hrdy, *State Patent Laws in the Age of Laissez Faire*, 28 BERKELEY TECH. L.J. 45, 48 (2013) (arguing that states shared concurrent patent powers with the federal government that encouraged the development of useful inventions).

<sup>179</sup> STORY, *supra* note 177, § 1149 ("[T]here does not seem to be the same difficulty in affirming, that, as the power of congress extends only to authors and inventors, a state may grant an exclusive right to the possessor or introducer of an art or invention, who does not claim to be an inventor, but [has] merely introduced it from abroad.").

<sup>180</sup> Hrdy, *supra* note 178, at 48.

<sup>181</sup> See STORY, *supra* note 177, § 1148.

<sup>182</sup> See *id.* at §§ 1148-49.

<sup>183</sup> But see Hrdy, *supra* note 178, at 72-73.

<sup>184</sup> An Act to Promote the Progress of Useful Arts, ch. 7, 1 Stat. 109 (1790).

<sup>185</sup> *Id.* § 1.

<sup>186</sup> *Id.*

that Congress could not have considered in passing the Act.<sup>187</sup> Thus, one of the early acts of the First Congress delegated to administrative officials the discretion to make law that would preempt conflicting state law.

### 3. State Control Over Waterways and *Gibbons v. Ogden*

The power of federal officials to issue decisions that preempt state law also played a role in the Court's first Commerce Clause challenge to state law. In *Gibbons v. Ogden*,<sup>188</sup> the Court considered whether the state could enforce an exclusive right for use of steamboats in state waters against a ship that was licensed for coasting under federal law.<sup>189</sup> The state law had forbidden any steam vessel from operating within New York without obtaining a license from the exclusive patent holders Livingston and Fulton.<sup>190</sup> The federal statute directed a "collector" to issue licenses to vessels to be employed in the coasting trade if they met particular statutory criteria.<sup>191</sup> By modern standards, the collector's determination would be viewed as an agency adjudication.

As mentioned earlier,<sup>192</sup> early nineteenth century congressional acts were far more specific than most modern agency delegations, and the federal licensing statute at issue did not leave much discretion to the collector.<sup>193</sup> Nonetheless, the license was issued by the collector, and, as this case illustrates, could potentially interfere with state law. In the New York Court of Appeals, prior to the case reaching the Supreme Court, the state argued that the statute authorizing the license simply established a means of collecting revenue in return for permission to engage in the coasting trade on terms more favorable than those allowed to foreign vessels.<sup>194</sup> The New York

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<sup>187</sup> MASHAW, *supra* note 58, at 50 (characterizing the discretion exercised by the original Patent Office as "quasi-judicial," even opining that this Office was "America's first flirtation with the independent commission").

<sup>188</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>189</sup> *Id.* at 2-3.

<sup>190</sup> *Id.* at 1-2.

<sup>191</sup> Act of Feb. 18, 1793, ch. 8, § 19, 1 Stat. 305.

<sup>192</sup> See *supra* notes 184-87 and accompanying text.

<sup>193</sup> Act of Feb. 18, 1793, ch. 8, § 19, 1 Stat. 305.

<sup>194</sup> Mr. Emmet arguing on behalf of New York advocated the following:

The registering, recording, and enrolling of vessels, were enacted by the act on that subject, passed September 1st, 1789. They were for the purpose of describing the vessel, her built, tonnage, and ownership; and neither they, nor their certificates, give, nor purport to give, any right to trade. . . . Registered or enrolled vessels, on application to the collector where they belonged, were entitled to receive a license to trade between the different districts in the United States, or carry on the bank or whale fishery for one year. The meaning of that license, notwithstanding the generality of its language, was only to certify that the proper tonnage duty for that year had been paid; and that the vessel was licensed, for that year, to trade without paying any tonnage duty.

*Gibbons*, 22 U.S. (9 Wheat.) at 133-34 (emphasis omitted) (footnotes omitted).

court agreed.<sup>195</sup> It considered the exclusive right to use steamships on state waters to be a property right, and reasoned that the license issued by the collector did not affect that right.<sup>196</sup> Interestingly, however, the state court treated the effect of the license as stemming from the act of the collector, not of Congress. The court, however, did not justify its decision by claiming that the collector could not preempt state law,<sup>197</sup> even though such justification would have been an obvious rationale had the state court understood the Supremacy Clause to operate as Rubenstein does.

When the case reached the Supreme Court, Chief Justice Marshall was not persuaded by the contention that Congress did not mean to confer preemptory power upon the agency. After determining that Congress had authority to regulate shipping and carriage of passengers between states and to fish the waters off the coast,<sup>198</sup> the Court determined that the federal license authorized ships to engage in these activities.<sup>199</sup> In response to the contention that Congress had not intended for licensing to authorize use of steam vessels in contravention of state law, Chief Justice Marshall reasoned that the statute included steamboats because the statute referred to vessels generally and did not create an exemption for locomotion by steam.<sup>200</sup> It did not matter whether Congress envisioned the statute covering steamboats contravening state law. The fact that Congress had the power to regulate in contravention of state law and had authorized the collector to license steamships to ply New York's waters was sufficient for the license to preempt the state statute.<sup>201</sup>

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<sup>195</sup> *Gibbons v. Ogden*, 17 Johns. 488, 510 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>196</sup> The state court declared,

Any person in the assumed character of owner, may obtain the enrolment and license required, but it will still remain for the laws and courts of the several states to determine the right and title of such assumed owner, or of some other person, to navigate the vessel. The license only gives to the vessel an *American* character, while the right of the individual procuring the license to use the vessel as against another individual setting up a distinct and exclusive right, remains precisely as it did before. It is neither enlarged nor diminished by means of the license; the act of the collector does not decide the right of property. He has no jurisdiction over such a question.

*Id.* at 494.

<sup>197</sup> *Id.*

<sup>198</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 211.

<sup>199</sup> *Id.* at 212-13.

<sup>200</sup> *Id.* at 219-20. Chief Justice Marshall also determined from legislation passed after the licensing statute that Congress had in fact intended the statute to cover steam vessels. *See id.* at 221 ("This act demonstrates the opinion of Congress, that steam boats may be enrolled and licensed . . . for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act."). But this determination was an alternative rationale, and the opinion makes clear that even if Congress had not so envisioned, the fact that the statute authorized the collector's licensing of steam vessels was sufficient for the license to have preemptive effect. In other words, even if the collector had discretion about the types of ships to license, that would not diminish the preemptive effect of his decision.

<sup>201</sup> *Id.* at 239-40.

Chief Justice Marshall also opined on the impact of the position of those, like Rubenstein, who would interpret federal powers narrowly to avoid contravention with state law.<sup>202</sup> After deciding the case, the *Gibbons* Court went on to warn,

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.<sup>203</sup>

It is as if Chief Justice Marshall anticipated Rubenstein's proposition that federal agencies should not have the power to overrule even directly conflicting state law when he explained that such a narrowing of the reach of federal law would undermine the functionality of the federal government.

## II. THE SCOPE OF ADMINISTRATIVE PREEMPTION

Thus far, this Article has demonstrated that Rubenstein's understanding of the preemptive effect of agency action is untenable as a means of establishing a workable government, as well as a matter of historical understanding.<sup>204</sup> This Article has further demonstrated that Clark's understanding of the preemptive effect of agency action is in tension with his reading of "Laws of the United States."<sup>205</sup> Together, these findings suggest that the better reading of "Laws of the United States" would include agency discretionary decisions, including orders and regulations. This Part of the Article turns now to develop the significance of this reading for the various ways in which discretionary agency action might preempt state law.

### A. *Administrative Conflict Preemption*

Given this Article's conclusion that administrative regulations come within the "Laws of the United States . . . made in Pursuance [of the Constitution]," there is no formal reason to treat preemption by conflict of state law with federal regulation differently from statutory conflict preemption. If it is impossible for a regulated entity simultaneously to comply with state law and validly adopted federal regulations, that such regulations count as

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<sup>202</sup> Rubenstein, *supra* note 5, at 1164-65.

<sup>203</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 222.

<sup>204</sup> See *supra* Parts I.B.2, I.B.4.

<sup>205</sup> See *supra* Part I.B.3.

federal law warrants treating them as controlling over state law.<sup>206</sup> The fact that Congress may not have envisioned regulations preempting state law does not matter. Congress frequently does not envision the regulations that agencies adopt, yet those regulations are still valid and enjoy the force of law.<sup>207</sup>

The same argument applies to state laws that frustrate the purposes of federal regulation—essentially administrative obstacle preemption. Even statutory obstacle preemption is controversial because it requires courts to identify the purposes of a statute and evaluate whether state law so frustrates them that the law should be deemed preempted.<sup>208</sup> Nonetheless, the general view recognizes the need for obstacle preemption because without it states would have great leeway to pass laws that undermine federal programs.<sup>209</sup> Administrative obstacle preemption actually avoids many of the problems with statutory obstacle preemption. Agencies must justify their regulatory decisions,<sup>210</sup> and therefore provide a detailed rationale on which courts can rely to evaluate the effect of state laws on federal regulatory programs.<sup>211</sup> Agency regulations are not merely the bare text of the regulation; they include gloss from the agency's justification for them.<sup>212</sup> Hence, courts

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<sup>206</sup> The Supreme Court has held that state law is preempted when a regulated entity cannot comply with such law and federal agency regulations, even in the absence of a statutory preemption provision. *See, e.g.*, *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000) (holding that state tort suits based on a standard that would conflict with federal regulations are preempted even though the statutory preemption provision did not preempt such suits).

<sup>207</sup> *See* Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 649 (2013) ("Congress cannot foresee all possible preemption scenarios or perfectly articulate the effect of its laws in all situations.").

<sup>208</sup> *See* Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1066-67 (2013) (describing the problems posed by the need to determine statutory purpose to resolve questions of obstacle preemption). Justice Thomas sees the problems as so significant that he refuses to recognize obstacle preemption at all. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring in the judgment).

<sup>209</sup> *See* Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1263 (2010) (arguing that obstacle preemption serves the important role of protecting "federal law and federal regulatory programs in all of their myriad forms from interference by state and local governments").

<sup>210</sup> *See* *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (mandating that agencies engage in reasoned decision making when adopting rules); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 415 (1971) (requiring a reviewing court to ensure that the agency considered relevant factors before acting).

<sup>211</sup> *See* *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 44-45.

<sup>212</sup> In notice and comment rulemaking, the Administrative Procedure Act requires that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (2006). Courts have essentially "replaced the statutory adjectives 'concise' and 'general' with the judicial adjectives 'detailed' and 'encyclopedic.'" 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.4, at 596 (5th ed. 2010). Nonetheless, the fact that these explanations are "incorporated"

often will have more detailed and reliable information about the purposes of regulations, and how the agency envisioned furthering those purposes. At the same time, given that implementation of regulatory programs usually depends on the agency adopting regulations or issuing orders, the concern that an overly restrictive conception of conflicting state laws will threaten federal programs is just as strong when applied to regulatory schemes as to statutory ones. Therefore, courts have every reason to apply obstacle preemption to federal regulations.

Those who worry about agencies running roughshod over state interests raise pragmatic concerns about administrative preemption. They believe that agencies do not have the institutional capacity to consider federalism issues,<sup>213</sup> that agencies will be biased in their consideration of such issues,<sup>214</sup> or that states have more influence over legislation than they do over regulatory outcomes.<sup>215</sup> Some scholars are simply concerned that administrative preemption makes it too easy to displace state law.<sup>216</sup> Although these normative concerns extend beyond the general positive focus of this Article, we provide a summary rejoinder to demonstrate that our reading of the Supremacy Clause is workable, and in fact comports to a large extent with current preemption doctrine.

Because states usually are well-represented repeat players in administrative policymaking, agencies generally take state interests in particular agency programmatic issues into account.<sup>217</sup> The administrative regulatory

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into the rule justifies courts relying on them to determine the scope and purpose of a rule that might preempt state law.

<sup>213</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (“Unlike Congress, administrative agencies are clearly not designed to represent the interests of States . . .”); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 721 (2008) (“[A]gencies do not seem to possess the expertise or institutional focus to decide when state laws are appropriately preempted.”); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 756 (2008) (“[A]gencies know little about constitutional law . . .”).

<sup>214</sup> See, e.g., Mendelson, *supra* note 213, at 722; Merrill, *supra* note 213, at 756.

<sup>215</sup> See, e.g., Thomas O. McGarity, *The Perils of Preemption*, 44 TRIAL 20, 24 (2008) (arguing that states’ use of Congress to limit agency preemption is their most effective resource while admitting that a legislative solution is institutionally impractical); Mendelson, *supra* note 213, at 721 (“The failure of agencies to consider the value of state autonomy and involvement unfortunately appears to be typical.”).

<sup>216</sup> See, e.g., Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 50 U. PITT. L. REV. 805, 832-33 (1998) (“[E]ven if a majority of the states’ representatives in Congress believe that preemption will unduly trammel state authority, an agency may nonetheless choose [it].”); Mendelson, *supra* note 213, at 706 (“[A] presumption against agency preemption . . . makes sense because it reduces the risk that agencies will possess excessive power to preempt state law . . .”); Merrill, *supra* note 213, at 756 (“Agencies may also pose a greater threat to stability in the division of authority [between the federal government and states], given that they are prone to policy shifts with changes in administration and can act to implement policy shifts much more quickly than Congress or the courts.”).

<sup>217</sup> See Galle & Seidenfeld, *supra* note 1, at 1973 (“[A]gencies’ abilities to assess programmatic federalism values more accurately than courts or Congress will outweigh any bias in their federalism considerations . . .”); Metzger, *supra* note 135, at 2075 (“Numerous factors, such as congressional oversight, federal officials’ ties to state regulators, lobbying by state political organizations, and depend-



process is more transparent, and arguably even more accountable, than the legislative process. Agency action is also subject to greater judicial scrutiny on review than are statutes, which can be struck down only if they violate the Constitution.<sup>218</sup> These attributes of administrative action further alleviate concerns that federal regulators will unreasonably discount state interests.<sup>219</sup> Finally, the ease with which agencies can displace state law is not problematic if such displacement is needed for a national solution to a regulatory problem when such a solution is appropriate.<sup>220</sup> Thus, there are normative arguments to back up this Article's positive conclusion that agency regulations should preempt state law based on their independent legal force. Moreover, with respect to conflict preemption, our position is consistent with existing doctrine: courts generally find conflict preemption based on federal regulations just as they do for federal statutes.<sup>221</sup>

### B. *Jurisdictional Preemption*

Courts have been hesitant to permit agencies to invoke jurisdictional preemption—that is, to explicitly preempt state law by regulation.<sup>222</sup> Courts that have recognized such preemption have required that the statute authorizing agency action explicitly empower the agency to preempt state law,<sup>223</sup>

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ence on state implementation, can all serve to give state regulatory interests leverage in federal agency decisionmaking.”).

<sup>218</sup> See 5 U.S.C. § 706 (2006) (setting judicial deference standards for the review of agency actions).

<sup>219</sup> Galle & Seidenfeld, *supra* note 1, at 1955-61 (discussing agency transparency); *id.* at 1979-84 (discussing accountability advantages of agencies because they can react more quickly to changes in the values of the electorate than can Congress).

<sup>220</sup> *Id.* at 1986-94 (noting that agency deliberation can give courts reviewing agency action a better idea of when a national solution is warranted); Metzger, *supra* note 135, at 2073 (“[T]he focus [of any inquiry into administrative federalism] . . . must be on ensuring that federal officials adequately consider and justify decisions that harm state interests, not that they forego such decisions altogether.”).

<sup>221</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000) (“The basic question, then, is whether a common-law ‘no airbag’ action like the one before us actually conflicts with [the Department of Transportation regulation at issue]. We hold that it does.”).

<sup>222</sup> See *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006) (“[W]e conclude the [federal regulation in question] does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct.”).

<sup>223</sup> See *Nat’l Ass’n. Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 429 (1989) (rejecting FCC preemption of state regulation of inside wiring because “the FCC may not use its preemptive powers in a manner that would negate the lawful exercise of state authority over intrastate service”); see also Sunstein, *supra* note 164, at 331 (“[A]dministrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law.”). This insistence has led to some confusing Supreme Court opinions. For example, in *Watters v. Wachovia Bank, N. A.*, the majority concluded that regulations of the Office of the Controller of the Currency (“OCC”) preempted application of state laws providing the power of state regulators to inspect the operations of an affiliate of a national bank. 550 U.S. 1, 14-17 (2007). The Court, however, conceded that the Act authorizing the OCC regulations did not itself

and even then some judges and commentators have doubted whether Congress can authorize explicit agency preemption.<sup>224</sup> But if regulations are “Laws of the United States” within the meaning of the Supremacy Clause, then courts should not require congressional authorization of preemption. It should be sufficient that agency regulations are valid regardless of their preemptive effect, which requires only that the agency was authorized to regulate generally and did so with sufficient consideration of all affected interests, including those of the states.

Those who advocate resistance norms to protect federalism interests might question whether general regulatory authority should be sufficient to authorize explicit regulatory preemption. That is, even if regulations are laws made in pursuance of the Constitution, regulations that preempt might be presumed to be beyond an agency’s power unless Congress has explicitly authorized preemption.<sup>225</sup> But, this presumption becomes untenable once one recognizes that an agency might choose private ordering and market mechanisms unimpeded by regulation as its preferred regulatory approach.<sup>226</sup> In such a situation, administrative preemption essentially implements the agency’s regulatory choice, and hence is a form of regulation encompassed within a grant of general rulemaking authority.<sup>227</sup> This understanding of preemption as regulation, however, easily extends to situations beyond *laissez faire* regulatory schemes. When an agency explicitly preempts state law, it is signaling that its regulation reflects a balance that

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preempt state law, and there is no provision authorizing OCC regulations to preempt state law. *Id.* The majority relied instead on Congress’s authorization of national banks to engage in mortgage lending via affiliates, and characterized OCC regulations as merely codified Congress’s understanding that affiliates were to be treated as national banks. *Id.* In essence, the Court was forced to rely on an implicit meaning of the statute that both did not preempt state law and yet was equivalent to federal regulations that did preempt state law.

<sup>224</sup> See Sunstein, *supra* note 164, at 331 n.81. Professor Sunstein reads *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), to suggest that Congress cannot delegate certain decisions, such as whether to preempt state law, to agencies. *Id.* at 336–37 (but expressing doubt that the principle would prevent Congress from delegating authority to preempt if it does so expressly).

<sup>225</sup> See generally Benjamin & Young, *supra* note 4, at 2115; cf. Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O’Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1803–04 (2006) (criticizing the Court as forfeiting coherence by relegating resistance of federal dominance of the regulatory arena to applications of administrative law and statutory interpretation).

<sup>226</sup> The dichotomy between private ordering via markets as an alternative to traditional government regulation is well established. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947 (1984) (“The persistent tension between private ordering and government regulation exists in virtually every area known to the law . . . .”); James C. Spindler, *IPO Liability and Entrepreneurial Response*, 155 U. PA. L. REV. 1187, 1191 n.7 (2007) (“[M]arket-oriented scholars have argued that a system of private ordering . . . is preferable to mandatory federal regulation.”).

<sup>227</sup> See Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1018–19 (2010) (describing “null preemption” as involving a difference between state and federal governments about whether market forces are preferable to regulation with respect to some problem within the jurisdiction of both governments, but arguing that it is rarely justified).

would be upset by any state regulation. Hence, explicit regulatory preemption merely facilitates the implementation of the agency's general regulatory authority.

We do not mean to suggest that agency jurisdictional preemption does not warrant some sort of heightened judicial oversight. The federal structure of our government warrants ensuring that agencies take state interests seriously before acting to significantly affect those interests.<sup>228</sup> An agency should encourage state participation in the regulatory process before choosing to preempt state law. Furthermore, whether or not Congress has specified that agencies should consider state interests in rulemaking, such interests are inherently relevant factors that a court can demand an agency take into account.<sup>229</sup> A reviewing court would thus be correct to reverse agency preemption as arbitrary and capricious if the agency failed to explain why preemption was necessary to implement its substantive policy.<sup>230</sup> In addition, Congress can limit the authority of an agency to issue regulations that jurisdictionally preempt state law because agencies have only the authority that their organic statutes give them.<sup>231</sup> But absent such an explicit limitation, under our reading of the Constitution, a court would be wrong to reverse administrative jurisdictional preemption as inherently beyond the agency's authority.

Field preemption, however, is a different matter. Essentially, field preemption occurs when courts read the comprehensive nature of a statute as evidence of intent to preclude any regulation within the statute's ambit despite Congress having failed to express such an intent.<sup>232</sup> Statutory legiti-

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<sup>228</sup> See Metzger, *supra* note 135, at 2073-76 (discussing the need for balance among federal and state interests).

<sup>229</sup> See William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1567 (2009) ("[T]he underlying triggers for traditional hard look review . . . are present when agencies declare preemptive power and effect."); Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611, 645-49 (2010) (explaining how notice and comment procedures and hard look review can ameliorate any shortcomings in agency consideration of state regulatory interest); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2186 (2009) (advocating hard look review of agency assertions of preemption because "[c]ourts are well poised to police agencies' flouting of their responsibilities in the domains of regulatory review and interpretation").

<sup>230</sup> See Buzbee, *supra* note 229, at 1569-70 (arguing that hard look review would require an agency to engage and be responsive to state interests and "to grapple with criticisms and counter-arguments [to preemption]").

<sup>231</sup> Theodore B. Olson, *Restoring the Separation of Powers*, 7 REG. 19, 29 (1983) ("In organic statutes, Congress can—and undoubtedly should—place more specific and precise limits on agency authority to issue rules . . .").

<sup>232</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."). See also Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163,

macy, however, derives from passage of a text by the constitutionally specified process and therefore does not depend on Congress providing any explanation for the basis for the statute.<sup>233</sup> For this reason, courts do not require Congress to provide any reasons for how it structures the statutes it passes.<sup>234</sup> Essentially, in finding field preemption, courts reason from the text of the statute, perhaps supported by some references in legislative history, to infer broad intent for federal law to be exclusive.<sup>235</sup>

The legitimacy of administrative action, by contrast, depends on that action being supported by reasoned explanation to ensure against arbitrary action.<sup>236</sup> Courts are not simply to look at the text of the regulations to determine whether they are valid, or even the extent of their reach.<sup>237</sup> This is precisely why obstacle preemption is less problematic when done by regulation than by statute. This different font of legitimacy for administrative action, however, works against the recognition of field preemption based on agency regulation covering the entire arena to be regulated. If an agency intends to occupy a regulatory field, our legal system expects the agency to state that intention explicitly and to explain the scope of that intention, as well as a justification, for the agency to exercise its regulatory power in a preemptive manner.<sup>238</sup>

In short, to be legitimate, exercises of regulatory power must not only be authorized, they must be justified in terms of the matter confronting the

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176 (2011) (noting that field preemption can be based on “detailed legislation targeting a particular industry or form of conduct”).

<sup>233</sup> Thus, the Affordable Care Act was upheld as within Congress’s taxing power despite the fact that Congress consistently asserted that the penalty in the Act was not a tax. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (“The ‘question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.’” (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948))); see also Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 874 (2008) (opining that the question of statutory construction “is the issue at the heart of every preemption case”).

<sup>234</sup> See, e.g., Benjamin & Young, *supra* note 4, at 2131-35.

<sup>235</sup> *Id.*

<sup>236</sup> See *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44-46 (1983) (delineating the reasoned decision-making standard of review of agency action); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 533 (2003) (arguing that the reasoned decision-making standard of review under ordinary administrative law is necessary to justify agency authority constitutionally).

<sup>237</sup> As the Court stated in its first *Chenery* decision,

If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

*SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

<sup>238</sup> See Galle & Seidenfeld, *supra* note 1, at 2011 (arguing that agencies should only be able to jurisdictionally preempt state law by legislative rulemaking subject to hard look review). Of course, this analysis of administrative field preemption does not preclude a court from attributing field preemption to a statute that envisions comprehensive agency regulation that occupies the field.

agency exercising that power. The conclusion that agency regulation is law “arising under [the] Constitution” obviates the agency’s need to demonstrate congressional intent that its regulation be preemptive, but still requires that the agency clearly spell out how and why it invokes jurisdictional preemptive regulation.

### C. *Chevron and Regulatory Preemption*

The relationship of agencies to their authorizing statutes raises preemption issues in one context unique to agency action. Not infrequently, statutes hint that they mean to preempt state law, but whether they do so is uncertain.<sup>239</sup> Other times, statutes explicitly preempt state law, but leave unclear the precise bounds of what is preempted.<sup>240</sup> Outside of the agency context, most Supreme Court justices have subscribed at least nominally to a presumption against preemption,<sup>241</sup> although the Court has not applied this presumption with much consistency or rigor.<sup>242</sup> Judicial review of an agency’s interpretation of a statute is usually governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>243</sup> which provides a competing rule for courts to resolve ambiguities in statutes administered by an agency.<sup>244</sup> *Chevron* dictates that if such a statute does not clearly resolve a particular interpretive issue, then a court reviewing an agency action that resolves that issue should defer to any reasonable agency interpretation.<sup>245</sup>

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<sup>239</sup> See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (finding congressional silence in the face of the awareness of the prevalence of state tort litigation implied that Congress did not mean for FDA approval of a drug label to preempt tort suits for inadequate labeling); *Watters v. Wachovia Bank, N. A.*, 550 U.S. 1, 19 (2007) (holding that federal law prohibiting states from exercising visitatorial powers on federal banks extended to a state registered subsidiary of a federal bank created to engage in mortgage lending).

<sup>240</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

<sup>241</sup> Justice Scalia (and perhaps Justice Thomas) has expressed his belief that the clear statement rule disfavoring preemption should apply only to situations where any preemption is uncertain, but not to determining the bounds of preemption that is expressly included in a statute. The other justices, however, purport to follow the rule that the clear statement rule limits preemption in both contexts. See Jeffrey R. Stern, *Preemption Doctrine and the Failure of Textualism in Cipollone v. Liggett Group*, 80 VA. L. REV. 979, 1001-02 (1994) (describing the justices stated positions regarding the presumption against preemption in *Cipollone*).

<sup>242</sup> See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1303 (2009) (“The Court’s readiness to find field preemption and its capacious view of what constitutes an obstacle for purposes of conflict preemption have led some commentators to argue that there is a presumption in favor of preemption, despite the Court’s refrain to the contrary.”).

<sup>243</sup> 467 U.S. 837 (1984).

<sup>244</sup> *Id.* at 842-43.

<sup>245</sup> *Id.* at 843.

The question then becomes which takes precedence—the clear presumption or *Chevron* deference.<sup>246</sup>

Substantive canons such as the presumption against preemption do not explicitly invoke congressional intent or a best reading of the words that Congress used.<sup>247</sup> Hence, unlike semantic canons,<sup>248</sup> the nature of substantive canons does not suggest that they necessarily should apply at step one of *Chevron*.<sup>249</sup> *Chevron* itself can be understood as a policy-based canon. It recognizes that, once a court determines that Congress did not clearly resolve a particular matter by statute, resolution of that matter involves policy rather than legal judgment, and that therefore such determinations are more appropriately made by expert and accountable agencies rather than politically insulated courts.<sup>250</sup> Thus, substantive canons are best seen as alternatives to *Chevron*; the question is which should apply.

To answer that question, a court should explain in any particular context whether invocation of the canon is superior to application of *Chevron*. Such explanation might focus on the extent that agencies are institutionally well suited to decide particular types of questions, as well as problems that might arise if an agency decision would trigger judicial review that could affect matters outside the agency's jurisdiction.<sup>251</sup> With respect to questions

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<sup>246</sup> See Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667, 678-79 (2011) (describing the tension between the canon disfavoring interpreting statutes to preempt state law and *Chevron* deference in the face of statutory ambiguity or silence). Although the Supreme Court has faced several cases whose facts invited it to address the relation of *Chevron* to the presumption against preemption, it has consistently declined this invitation. *Id.* at 668.

<sup>247</sup> This creates a tension between some substantive canons and textualism. See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 426 (2010) (“[W]idely held social commitments’ are soft sand upon which to build a regime of clear statement rules.”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419-21 (2003) (“[F]ailure to apply the lessons of modern intent skepticism to the absurdity doctrine calls into question the coherence of the textualists’ . . . objections to strong intentionalism . . .”). Justice Scalia claims that the tension is not so great because such canons as clear statement rules apply to outcomes that we would not expect Congress to enact into law, and therefore may lead to a “no-thumb-on-the-scales” reasonable reading of statutes. ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997).

<sup>248</sup> See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76 (2008) (“Inquiries into the statute’s text, structure, and purpose, as well as traditional textual construction canons, fit well within [*Chevron*’s step one] positive inquiry . . .”).

<sup>249</sup> See Mendelson, *supra* note 128, at 745. But see Bamberger, *supra* note 248, at 77 (reporting that most courts see substantive canons as traditional tools that courts should use to resolve statutory ambiguity at step one of *Chevron*).

<sup>250</sup> See Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 294 (2011) (“[The] foundation for *Chevron* is a self-imposed judicial restraint to avoid taking the primary role in interpreting statutes when accepting that role creates a significant potential for a judge . . . to impose an interpretation that furthers her policy preferences.”).

<sup>251</sup> See Galle & Seidenfeld, *supra* note 1, at 2019-20 (explaining that invocation of the constitutional avoidance canon within *Chevron* is inappropriate if the agency’s interpretation would force the Court to resolve a constitutional question whose impact falls almost exclusively on programs administered by the agency that triggered the constitutional question).

of preemption of state law, agencies have the capability to adequately take account of state interests in a particular regulatory matter, and to weigh those against other programmatic concerns.<sup>252</sup> Moreover, when an agency interprets a statute that it administers as preempting state law, that interpretation would not have legal effects outside of the agency program that the statute authorizes.<sup>253</sup> It is possible that a particular preemption issue might affect state interests so fundamentally as to rise to the level of threatening states as alternatives to which the polity could turn for the exercise of sovereign power.<sup>254</sup> But this is unlikely for a simple question of whether a statute addressing a particular regulatory area preempts state law.<sup>255</sup>

The fact that administrative regulations and orders can have preemptive effect without an express authorization of preemption by Congress supports applying *Chevron* to questions of whether a statute preempts federal law. From this fact it follows that interpretive questions of preemption are not formally different from other interpretive questions that essentially hinge on policy determinations. The Court has predicated *Chevron* on a presumption that Congress expects the agency to speak with the force of law when it issues regulations and orders.<sup>256</sup> The same should be true when agency action would have the force of law with respect to preemption.<sup>257</sup> We want to emphasize that deference to an agency's preemptive interpretation should not excuse the agency from explaining why preemption is warranted. But once one recognizes that preemption is a policy choice that an agency is free to make, one cannot justify a special rule disfavoring interpretations that preempt state law in the face of a clear agency interpretation that survives hard look review.

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<sup>252</sup> See *id.* at 2008-10.

<sup>253</sup> See *id.* at 2009-13.

<sup>254</sup> Essentially, if a preemption question raised a question of abstract federalism, a court might appropriately decline to apply *Chevron*. See Galle & Seidenfeld, *supra* note 1, at 1971-75 (but opining that abstract federalism is unlikely to be an issue in federalism matters agencies address and is of less importance to the electorate than programmatic federalism).

<sup>255</sup> *Id.* at 2012.

<sup>256</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (“[I]mplementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”). Consistent with *Mead*, an agency interpretation regarding the preemptive effect of a statute should not get *Chevron* deference if made outside of the kind of proceeding that warrants *Chevron*, as opposed to *Skidmore*, deference.

<sup>257</sup> To the extent that a court accepts our suggestion that agencies can jurisdictionally preempt state law only by legislative rule, an interpretation that a statute preempts state law, issued as part of an adjudicatory order, would not warrant *Chevron* deference under *Mead*'s rationale. See *supra* note 238 and accompanying text. Of course, substantive interpretation of a statute made in an order that has force of law should receive *Chevron* deference even if that interpretation will negate state laws that conflict or undermine the obstacle of the federal regulatory scheme.

## CONCLUSION

This Article challenges the claim that, as a matter of positive law, administrative action falls outside the Supremacy Clause's phrase "Laws of the United States . . . made in Pursuance [of the Constitution]." <sup>258</sup> Such challenges derive from the work of Clark, who argues the Senate must be involved in adoption of any federal provision of law that preempts state law. <sup>259</sup> To the extent that Clark recognizes that administrative action can preempt state law, his position is in tension with his fundamental argument. It is unrealistic to believe that Congress can predict the regulations and policies that agencies will adopt when it authorizes administrative action. Without awareness of future agency action, Congress cannot possibly evaluate the degree to which state law will interfere with federal regulation, the impact of preemption on state programs, or even whether future administrative actions will conflict with state law. Hence, maintaining that Congress is responsible for administrative preemption is a legal fiction. The language of the Supremacy Clause and the history of inclusion of its phrase "Law of the United States" do not sufficiently support Clark's reading to justify resort to this legal fiction. <sup>260</sup>

Rubenstein, like us, seems to recognize the tension in Clark's position. He attempts to resolve that tension by taking Clark's argument to its logical conclusion—contending that administrative action, not being subject to Senate approval, cannot preempt state law. <sup>261</sup> Hence Rubenstein would require Congress to certify any preemptive effect of agency action after the fact. Rubenstein's proposal would require that Congress statutorily negate conflicting state law—an alternative to judicial enforcement of the Supremacy Clause that the framers of the Constitution explicitly rejected. <sup>262</sup> Moreover, Rubenstein's understanding of the potential preemptive impact of federal administrative action is contrary to that held during the earliest years of the United States, as manifested by the effects given to administrative actions during that period. If these reasons are not sufficient to inter Rubenstein's proposal, we nail the coffin shut by illustrating that his proposal would have a debilitating effect on the implementation of virtually every federal regulatory program—an effect that Chief Justice Marshall recognized in the earliest federalism cases. Based on this rejection of Clark's and Rubenstein's positions, this Article concludes that administrative action can have preemptive authority in its own right, without resort to the fiction that authorization of such action by Congress imparts the authority to preempt conflicting state law.

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<sup>258</sup> U.S. CONST. art. VI, cl. 2.

<sup>259</sup> Clark, *supra* note 6, at 1347, 1365.

<sup>260</sup> See *supra* notes 68-72 and accompanying text.

<sup>261</sup> Rubenstein, *supra* note 5, at 1167.

<sup>262</sup> *Id.* at 1179.



This Article proceeds to explore the implications of recognizing that administrative action, by its own force, can have preemptive effect. Because limiting the impact of state law can be viewed as a regulatory decision, this Article concludes that agencies can both preempt conflicting state law and explicitly prohibit exercises of state regulation over matters within an agency's rulemaking authority. The fact that administrative action, unlike statutes, cannot be justified by appeal to arbitrary political choices, however, eliminates the potential for such action to preempt state law by occupying the regulatory field.